

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGINE, INC., a Nevada corporation,) No. C-06-2692 SC
Plaintiff,)
v.) ORDER REMANDING
SPI/SEMICON, INC., a California corporation; SPI/SEMICON PHILS. INC., a Philippines corporation; SPI/SEMICON EUROPE GmbH, INC., an Austrian corporation; DML, INC., a Nevada corporation; DAVID KIETZKE, an individual; LARRY KIETZKE, an individual; MICHAEL KIETZKE, an individual; and DOES 1-50, inclusive, Defendants.)
Defendants.)
) ACTION TO STATE COURT

I. INTRODUCTION

Imagine Inc. ("Plaintiff") brought this action against SPI/Semicon, Inc., et al. ("Defendants") in the Superior Court for the County of Alameda, California, alleging causes of action for, inter alia, breach of contract and fraud. Defendant DML, Inc. is incorporated in Nevada, as is Plaintiff.

Defendants timely removed the action to this Court based on diversity of the parties, alleging that the non-diverse defendant, DML, Inc., is a "sham defendant who must be disregarded in

1 determining diversity.¹ Defendants have also filed a motion to
2 dismiss certain defendants for lack of personal jurisdiction and
3 to dismiss certain causes of action for failure to state a claim
4 upon which relief can be granted.

5 The Court ordered Defendants to show cause why this action
6 should not be remanded to state court. The Court has received
7 responses from both parties on this issue.

8 The Court, for the reasons contained herein, REMANDS this
9 action to state court. Defendants' motions are DISMISSED as moot.
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11 **II. BACKGROUND**

12 The following facts are taken from the Complaint and will be
13 assumed as true for purposes of this Order.

14 Plaintiff is a corporation organized under the laws of
15 Nevada. See Complaint ¶ 1 ("Compl."); Notice of Removal ¶ 7
16 ("NR"). Defendant DML, Inc. is also a Nevada corporation.
17 See Compl. ¶ 5; NR ¶ 8. Defendant David Kietzke is an officer and
18 agent of Defendants SPI Domestic, SPI Philippines, and SPI Europe.
19 See Compl. ¶ 5. Defendants David Kietzke, Larry Kietzke, and
20 Michael Kietzke are sole owners of 100% of the shares of stock in
21 Defendant DML, Inc. See id. at ¶ 10.

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23 ¹ Suits filed in state court may be removed to federal court
where the federal court would have had original jurisdiction over
24 the action in the first instance. See 28 U.S.C. § 1441(a). The
federal courts have "original jurisdiction over all civil
25 actions arising under the Constitution, laws or treaties of the
United States." 28 U.S.C. § 1331. The federal courts have
original jurisdiction over all civil actions where the matter is
26 between citizens of different states and where the amount in
controversy exceeds the sum or value of \$75,000.00, exclusive of
27 interests and costs. See 28 U.S.C. § 1332.
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1 In 1996, Plaintiff started providing a "variety of consulting
2 services to SPI Domestic." Id. ¶ 19. In 1997, SPI Domestic and
3 Plaintiff "reduced their consulting agreement to writing" by
4 executing the Consulting Agreement. Id. Plaintiff alleges that
5 Defendants refused to pay the compensation mandated by the
6 Consulting Agreement. See id. ¶¶ 41, 47, 56.

7 As a result, Plaintiff filed suit in the Superior Court of
8 California for the County of Alameda, alleging causes of action
9 for breach of an oral contract, fraud, quantum meruit, and others.
10 See Compl. Defendants timely removed this action to the U.S.
11 District Court for the Northern District of California.

12 Plaintiff asserts that "a unity of interest and ownership
13 [exists] between" the corporate and individual defendants such
14 that "any separateness between them has ceased to exist," and that
15 the Kietzke Defendants "intermingled or failed to segregate the
16 assets of" the SPI corporations and DML, Inc. Id. 12-13. This
17 "unity of interest and ownership" has resulted in the SPI
18 Defendants and DML, Inc. to be "the alter egos" of the Kietzke
19 Defendants. Id. Plaintiff alleges that the intermingling of the
20 corporations' assets with those of DML, Inc. was done to "evade
21 payment of obligations owed to Imagine as a creditor of SPI
22 Philippines and SPI Europe." Id. ¶ 12.

23 **III. DISCUSSION**

24 On the face of the Complaint, it appears that complete
25 diversity is lacking.

26 Yet, Defendants removed to this Court alleging that diversity
27 jurisdiction exists. To this end, Defendants contend that "DML is
28

1 a sham defendant who must be disregarded in determining diversity"
2 because "DML is not alleged to be the alter ego of SPI Asia or of
3 SPI Europe, the only Defendants with whom Plaintiff alleges it
4 contracted. As DML is not alleged to be the alter ego of SPI Asia
5 or SPI Europe, and is further not alleged to be the agent of
6 either, as a matter of law, it cannot be liable for their
7 actions." NR ¶ 17. In their present papers, Defendants assert
8 that "DML is but a sham defendant, in that nowhere does Plaintiff
9 allege that any of the other Defendants are the alter egos of
10 Defendant DML." Defendants' Response to Court's Order to Show
11 Cause at 2.

12 The Court needed further briefing on the issue of subject
13 matter jurisdiction, an issue Plaintiff had not raised.
14 Consequently, the Court ordered Defendants to provide such
15 briefing.

16 A federal court may examine the question of subject matter
17 jurisdiction sua sponte. See Steel Company v. Citizens for a
18 Better Environment, 523 U.S. 83, 94 (1998). When a court lacks
19 jurisdiction, the "only function remaining to the court is that of
20 announcing the fact and dismissing the cause." Id., quoting Ex
21 parte McCardle, 7 Wall. 506, 514 (1868).

22 Defendants face a steep upward climb. Not only is the
23 removal statute strictly construed against removal, see Boqqas v.
24 Lewis, 863 F.2d 662, 663 (9th Cir. 1988), but defendants alleging
25 that a plaintiff is fraudulently joined must "show that
26 individuals joined in the action cannot be liable on any theory."
27 Ritchey v. Upjohn Drug Company, 139 F.3d 1313, 1319 (9th Cir.
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1 1998). Making such a showing is all the more difficult because
2 "all questions of fact and all ambiguities in the controlling
3 state law are [to be] resolved in plaintiff's favor." Calero v.
4 Unisys Coporation, 271 F. Supp. 2d 1172, 1176-1177 (N.D. Cal.
5 2003) (citation and quotation marks removed).

6 The Court finds that Defendants have not demonstrated that
7 there is no possibility that Plaintiff could allege a claim
8 against DML, Inc. Taking the allegations as true, if Defendants
9 used DML, Inc. as a way of avoiding paying the contractual
10 compensation, then it is possible that Plaintiff has a claim
11 against DML, Inc. Contrary to Defendants assertions, Plaintiff
12 has not merely stated that simply because a parent owns
13 subsidiaries, it is liable for the actions of the subsidiaries.
14 Rather, Plaintiff also alleges that DML, Inc. was actually used by
15 Defendants to evade their contractual obligations. Even if
16 Plaintiff's alter ego allegation is baseless, Defendants have not
17 shown that Plaintiff cannot bring a claim against DML, Inc. as a
18 participant or conspirator in the alleged wrongdoing.

19 The Court finds that DML, Inc., is at present a proper, not a
20 sham, defendant. Its presence in this action destroys diversity.
21 Therefore, the Court lacks jurisdiction over this matter.
22 Accordingly, the Court REMANDS this action to the state court from
23 whence it came and DISMISSES Defendants' motions as moot.

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IV. CONCLUSION

2 Because it lacks jurisdiction, the Court REMANDS this action to
3 the Superior Court of California for the County of Alameda.
4 Defendants' motions are DISMISSED as moot.

6 IT IS SO ORDERED.

Dated: September 5, 2006

Samuel Foster.

UNITED STATES DISTRICT JUDGE